Saar Expert Papers

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Conference Report: The European Union as Protector and Promoter of Equality

28-30 March 2019

Programm für lebenslanges Lernen

07 / 2019 EN

About the paper

At the end of March 2019, the Jean Monnet Chair for European Integration, Antidiscrimination, Human Rights and Diversity organised an international and interdisciplinary conference at the European Academy in Otzenhausen on "The European Union as Protector and Promoter of Equality" which was co-funded by the German Research Association (Deutsche Forschungsgemeinschaft). The following Conference Report was written by Prof. Dr. Thomas Giegerich, LL.M. and his research associates Simon Biehl, Katharina Koch, Dennis Traudt and Laura Katharina Woll.

Preface

This publication is part of an e-paper series (Saar Expert Papers), which was created as part of the Jean-Monnet-Saar activity of the Jean-Monnet Chair of Prof. Dr. Thomas Giegerich, LL.M. at the Europa-Institut of Saarland University, Germany. For more information and content visit http://jean-monnet-saar.eu/.

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ISSN

2199-0069 (Saar Expert Papers)

Citation

Giegerich/Biehl/Koch/Traudt/Woll, Conference Report: The European Union as Protector and Promoter of Equality, 28-30 March 2019, 07/19 EN, online via: http://jean-monnet-saar.eu/?page_id=70

Kofinanziert durch das Programm Erasmus+ der Europäischen Union

DFG Deutsche Forschungsgemeinschaft

CONFERENCE REPORT:

The European Union as Protector and Promoter of Equality

28 – 30 March 2019

European Academy Otzenhausen (Saarland)

Thomas Giegerich, Simon Biehl, Katharina Koch, Dennis Traudt and Laura Woll

Increasing attacks and resentment against particularly exposed groups (esp. migrants, refugees, members of religious minorities and LGBTI-persons) have raised the importance of equality and antidiscrimination issues. Since the foundation of the United Nations, equality and non-discrimination have been core principles of the international community, as is made obvious by the UN Charter and the Universal Declaration of Human Rights. The European Convention on Human Rights as well as EU law prohibits discrimination and the EU is virtually founded on the values of equality and non-discrimination. The Charter of Fundamental Rights of the EU contains the most modern and extensive catalogue of prohibited grounds of discrimination. European integration has given new impulses to antidiscrimination law both within Europe and beyond.

The conference aimed at improving the understanding of the European Union as a project with an important antidiscrimination focus. Apart from debating if the concepts of diversity, pluralism and equality are inherent in European integration, it was also analysed how effective the EU has been in combatting discrimination inside and outside Europe. The conference took a multinational and interdisciplinary approach, looking at different aspects of the topic and examining them from various intra- and extra-European angles.

The **first part of the conference** focussed on "**Equality as a Fundamental Value of the EU**". *Stefan Kadelbach* (Goethe University, Frankfurt am Main, Germany) raised the question **"Are Equality and Non-Discrimination part of the EU's Constitutional Identity?"** He first analysed the content of the principles of equality and non-discrimination with a special emphasis on Art. 2 TEU. The provision reflected a holistic approach to equality. It was supplemented by specific non-discrimination and equality provisions in the Treaties and the case law of the CJEU. In *Kadelbach's* view, the specific non-discrimination provisions consisted of subprinciples to the general principle of equality and were as such constitutive of the European Union legal order. *Kadelbach* pointed out that the principle of equality was an essential part also of what he called the European private law constitution. This was backed by the fact that the principle of equality could be seen as the underlying rationale of the four freedoms of the internal market and European competition law. Thus, "the principle of equality and non-discrimination is not simply one of the constitutional principles of the EU", *Kadelbach* stated, "but it is in the DNA of the European Union."

In her comment, *Ana Maria Guerra Martins* (University of Lisbon, Portugal) analysed the meaning of the EU's constitutional identity. The first question was whether the EU had a constitution. Secondly, that constitution must have an identity distinguishing it from other constitutions (such as the US Constitution). Finally, the EU constitution must define a common destiny of its subjects. Whereas the first two elements could rather easily be identified, the last one was highly debatable and the most difficult to verify.

Thomas Giegerich (Europa-Institut, Saarland University, Germany) addressed **"The Political Dimensions of Equality in the EU: Equality of Union Citizens and Equality of Member States in a Supranational Representative Democracy".** EU decision-making had a dual democratic legitimation basis – the Union citizens and the Member States – that was reflected in the Union's institutional structure – the European Parliament and the Council (Art. 10 TEU). The Union citizens played a crucial role in this legitimation system in "their dual capacity as equal EU citizens and citizens of equal Member States". In the Council, the double majority (Art. 16 (4) TEU) combined elements of formal Member State equality and substantive equality based on population. The composition of the European Parliament was determined by the principle of degressively proportional representation (Art. 14 (2) TEU). This led

to the overrepresentation of the less populous Member States and derogated from the equal right to vote which was the core of individual political equality. However, that was part of an overall compromise between the transnational equality of Union citizens and the national equality of Union citizens organised in democratic Member States, whose counterpart was the second element of the double majority in the Council: The composition of the European Parliament was based on the transnational equality of citizens, but considerably modified in favour of the equality of citizens nationally compartmentalised in democratic Member States, whereas the decision-making in the Council was based on the equality of democratic Member States, but considerably modified in favour of the transnational equality of Union citizens. This overall compromise had gradually evolved in the direction of more transnational political equality, without completely achieving that objective.

In his comment, *Gareth Davies* (University of Amsterdam, The Netherlands) introduced his understanding of equality and non-discrimination in general. In his view, the political system of the EU was unequal: The Member States were unequal (which was politically reflected in the qualified majority voting in the Council) and citizens from different Member States had different voting rights regarding the European Parliament. Moreover, Union citizens, in reality, voted for the European Parliament as citizens of their Member States and not as transnational Union citizens. Therefore, the European Parliament was more a composite of different national parliaments than a single homogeneous European parliament. In *Davies's* view, the Union citizenship was a citizenship of rights and not a political citizenship. Furthermore, although being a derivative citizenship, Union citizenship was not subordinated to the national citizenships. Rather, in the context of rights, it was superior to them. While the EU system was politically decentralised because it was politically dominated by the "national" input, legally speaking the EU was not decentralized. Rather, EU law was in many ways more restrictive to the freedom of Member States than the federal law in federal states like the USA. *Davies* saw one possible reason for this in the nature of the EU's constitution with its considerable centripetal force.

Anne-Lise Kjaer (University of Copenhagen, Denmark) next dissected the **"Equality of Languages in the EU"**. She first analysed the language regime of the EU with special emphasis on the different working languages in the EU's institutions. In this context she explained the different approaches to tackle multilingualism in international organisations in order to work and communicate efficiently. There were 24 official languages in the EU plus some additional languages. In the Commission, the internal working languages were English, French and German. In the Court of Justice, the claimant could use each of the 24 official languages as the language of the case. The authentic version of the judgement was in that chosen language, although the internal working language of the CJEU had remained exclusively French. According to the CJEU, there was no legal principle of language equality and no le-

gal right to have access to every document which might have an effect on the individual in his or her language. Secondly, *Kjaer* explained the development of multilingual interpretation by the CJEU with a special emphasis on the different principles guiding this interpretation. As a direct consequence of the fact that all 24 languages were regarded as equal, the Court could not simply use grammatical interpretation, but had to focus on teleological interpretation.

In his comment, *Xabier Arzoz Santisteban* (Spanish Constitutional Court, Madrid, Spain) underlined the complexity of the EU's constitutional framework concerning linguistic issues. He identified at least four fundamental constitutional values linked to those issues. First of all, there was the principle of non-discrimination, including *inter alia* the non-discrimination of languages. The second fundamental principle was minority protection regarding national as well as linguistic minorities. From his point of view, the problem with both of these fundamental values was that EU law did not define the specific rights which derived therefrom. The third value consisted in the protection of linguistic diversity as a cultural and constitutional asset of the EU. As the fourth fundamental value, *Arzoz* brought up the principle of all citizens' equal access to the EU as an organization and to its legal norms. Furthermore, he asked the question whether language equality could be a fundamental value of the EU, even though it was not a fundamental value in all Member States. Thereafter, he assessed the EU's commitment to language diversity. In his opinion, three factors were relevant as to why the EU could not be regarded as a promoter of linguistic diversity: The reluctance of the Member States; the narrow scope of the Treaty provisions concerning language equality; and the limited ambitions of the institutions in this regard.

In the subsequent discussion the question was raised if English should stay the dominant working language in the EU after the Brexit. In the opinion of *Anne-Lise Kjaer*, at least from a practical perspective English would remain the *lingua franca* of the EU. Regarding the question whether the ratification of global antidiscrimination treaties by the EU could be used as evidence of the importance of equality as a constitutional principle of the EU, *Stefan Kadelbach* pointed out that global human rights treaties were often not open to accession by intergovernmental organisations. In this regard, *Anna Maria Guerra Martins* also referred to the problem of the division of competences between the EU and the Member States which led to either compulsory or voluntary mixity of treaties concluded with third States. A further question was whether the double majority in the Council's qualified majority voting better reflected the notion of substantive equality than the previous method of weighting voting. *Thomas Giegerich* affirmed this question, because the pre-Lisbon system less adequately reflected differences in population than the current one. Moreover, the panel discussed the differences between the principles of equality and non-discrimination. While both principles had different historic origins, they derived from the same fundamental idea. In this context, equality could

be considered as a general constitutional principle, whereas the principle of non-discrimination referred to specific characteristics or special contexts. *Gareth Davies* added that equality was more like a source of positive obligations, whereas non-discrimination produced prohibitions. The last question was if Union citizenship could ever become independent of Member States citizenships. Although one could observe such a development in federal States like the USA and Germany, *Thomas Giegerich* remained sceptical whether that federal model would be adopted by the EU in the foreseeable future. The German Federal Constitutional Court had made clear that it would not accept such a development.

The **second part of the conference** focussed on **"The EU as Protector of Equality – General Part of EU Antidiscrimination Law"**. The initial speaker *Colm O'Cinneide* (University College London, UK) tackled the problem of "**EU Antidiscrimination Law and International Human Rights Law – Does Closer Political Integration Produce Better Anti-Discrimination Law?**" He stated that EU antidiscrimination law had initially developed in a relatively self-contained legal space because of the lack of international and national constitutional standards concerning equality issues. Therefore EU law had often been a "pacesetter". As the situation had changed, the question today was whether the CJEU should continue to insist on the autonomy of EU law also in this respect and what role other human rights standards should play in the interpretation of the EU Charter of Fundamental Rights. An analysis of the case-law demonstrated that the CJEU largely adhered to an autonomous approach, sometimes setting aside well-established national constitutional standards. Concerning the potential conflict with other sets of standards, *O'Cinneide* saw a need for conceptual openness, especially regarding the requirements of the ECHR. In his opinion, the CJEU should in the future avoid the type of problematic reasoning that characterised the *Achbita* case, since integration should not mean dilution of otherwise established human rights standards.

In her comment, *Janneke Gerards* (Utrecht University, The Netherlands) concentrated on the antidiscrimination law set forth in the European Convention on Human Rights. She pointed out that the CJEU and the ECtHR had different approaches to non-discrimination-issues. Citing the divergent cases of *Achbita* (CJEU) and *Eweida* (ECtHR), she showed that the CJEU did not embark on an open balancing test of conflicting freedoms, in accordance with the tradition of a court which had always championed economic freedom. *Gerards* concluded that as long as these differences persisted, the European States had no way of knowing which path to follow. She therefore called upon the CJEU to align its judgments with international human rights law.

Sara Benedi Lahuerta (University of Southampton, UK) raised the question "**Has the EU Taken Comprehensive and Coherent Action to Combat Discrimination?"** She answered it in the negative, stating that EU action was neither coherent nor comprehensive, due to its incremental development and the existing political and economic contingencies. In her opinion, improvements were possible at the substantive and the enforcement level (*e.g.* by establishing equality bodies and permitting collective action).

In her comment, *Marie Mercat-Bruns* (Conservatoire des Arts et Métiers and Sciences Po, Paris, France) raised some additional questions such as whether the CJEU case law had progressively developed the concept of discrimination by such notions as "discrimination by association" or "appearance of discrimination". That might influence other jurisdictions. Another question was how antidiscrimination law could encourage collective bargaining agreements on work-life-balance. While it was positive that some transformative changes had become apparent, the question still was how the implementation of equality rights could be monitored better.

The third speaker, *Justyna Maliszewska-Nienartowicz* (Nicolaus Copernicus University, Toruń, Poland), covered "**The General and Specific Exceptions to the Prohibition of Discrimination in the Primary EU Law and in the EU Anti-Discrimination Directives**". She explained that the CJEU played an extremely important role in that area by clarifying the scope of all exceptions to the prohibition of discrimination (*e.g.* employment in public service, public policy, security and health) and by insisting on their strict interpretation. In practice, the Court's assessment focussed on whether the aim of a given provision was legitimate and whether the measures applied were proportional to that aim. *Maliszewska-Nienartowicz* concluded that the control of proportionality was at the centre of the judicial assessment of all exceptions to the prohibitions of discrimination in EU law.

Sara Iglesias Sanchez (Court of Justice of the EU, Luxembourg) commented on *Maliszewska-Nienartowicz's* presentation from the perspective of the CJEU, but strictly in her personal capacity.

Katrin Wladasch (Ludwig Boltzmann Institute for Human Rights, Vienna, Austria) then expounded the problem of "**Making Anti-Discrimination Law Effective: Burden of Proof, Remedies and Sanctions in Discrimination Cases**". She explained that in principle it was up to the national legislatures to design sanctions and remedies, but they had to be proportional, dissuasive and effective. For example, Art. 18 of the recast EU Gender Directive 2006/54 required real and effective compensation or reparation for the damage sustained by victims of gender discrimination. *Wladasch* also looked into the effectiveness of sanctions from the perspective of the independent equality bodies in Europe. *Inter alia,* she mentioned administrative fines, publication of the decisions, reinstatement of victims of discrimination

and compensation with amounts that really had dissuasive character. She concluded that to enhance effectiveness, proportionality and dissuasiveness, Member States had to improve access to relevant information, support judges in understanding and applying the shift of the burden of proof and in developing further sensitivity to issues of diversity and discrimination, but at the same time monitor the enforcement of decisions that were taken in reaction to discrimination.

In her comment, *Amalie Frese* (University of Vienna, Austria) noted that there was a lot of legal material for empirical studies and raised several complementing questions: What was meant by effectiveness if used to describe antidiscrimination efforts? Was there an optimal approach concerning the burden of proof? Was there one comprehensive uniform European system of antidiscrimination law or many separate subsystems? She concluded that the meaning of effectiveness needed to be more thoroughly discussed and defined.

Marc de Vos (Itinera Institute and University of Gent, Belgium) spoke about "**Positive Action and its Limits in EU Law**". He first distinguished the concepts of direct and indirect discrimination and explained the necessity to ensure equality both in law and in fact. He then looked at the cases C-284/02, C-335/11 and C-157/15 on pregnancy related rights (where the Equal Treatment Directive was intended to bring about equality in substance rather than in form), disability discrimination and indirect religious discrimination. He explained that EU law was mixing formal and substantive equality in its sources and concepts and that its interpretation of formal equality embraced substantive equality goals organically. Ultimately there was no binary divide between the formal equality of opportunity and the substantive equality of outcome.

In his comment, *Álvaro Oliveira* (European Commission, Brussels, Belgium) focussed on the European Commission's proposal for a new Directive on work-life balance for parents and carers. This Directive would encourage men to stay at home after their children were born, because in practice it was mostly women who took parental leave, leading to career breaks for them. The aforementioned proposal constituted a change from the focus on protection of women to a stimulant for men to take up caring work at home and wanted to give people more options. He explained that it was a change of paradigm from protection to integration. *Oliveira* concluded that while the small number of discrimination cases before the CJEU posed a mystery to him, he presumed that in the future there would be more cases of that kind.

The **third part of the conference** focussing on **"Selected Special Issues of Antidiscrimination Law"** was commenced by a presentation by *Andreas Ziegler* (University of Lausanne, Switzerland) on "**Discrimination on Grounds of Sexual Orientation and Identity**". He initially identified the relevant provisions, Art. 2 and Art. 3 (3) TEU and Art. 7 and Art. 21 of the

Charter of Fundamental Rights of the EU. *Ziegler* pointed out that although this area was still mostly regulated by national legislation, an increase in EU legislation could be discerned. Discrimination on grounds of sexual orientation had initially not been a concern of the EU. Nevertheless, it was co-regulated together with other areas such as non-discrimination of workers, markets for products, free movement of persons, asylum and foreign relations. *Ziegler* then focussed on different aspects of sexual orientation and identity discrimination. In this context, he addressed the issue of non-discrimination of homosexuals in the workplace, referring to the latest CJEU case *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA* which accorded a certain retroactive effect to the Directive 2000/78. The first pertinent staff regulation cases dated from 1999 and dealt with the question whether the non-recognition of registered partnerships could justify different treatment with regard to pension rights. He also mentioned the *Léger* case on the exclusion of homosexual men from donating blood because they were more likely to transfer HIV. With regard to asylum cases, *Ziegler* pointed out that gender identity was included in the word "gender" used in the Qualification Directive, whereas lesbians and gays were considered as being included in the category "particular social group". Two recent CJEU judgments had to deal with the question what kind of proof could be required from an asylum seeker that he was homosexual. Finally, *Ziegler* pointed to the effects which the free movement of rights of persons might have in this area, as was most prominently demonstrated by the CJEU's *Coman* case.

In her comment*, Anna Einarsdottir* (University of York, UK) briefly presented the results of her research on the situation of LGBTI employees. The main problem was the exclusion of LGBTI persons from employment. With regard to *Ziegler's* presentation, she referred to the privilege of marriage as a social and economic unit which was denied to LGBTI persons in some countries, sometimes even the recognition of registered partnerships. The principle of non-discrimination based on sexual orientation as set forth in the Treaties was an expression of the shared values of the Member States in this particular field.

Dagmar Richter (University of Heidelberg and Saarland University, Germany) addressed "**Overweight and Obesity as a Ground of Discrimination**". She defined overweight and obesity by (critical) reference to the body mass index and inquired into the possible causes of overweight and obesity, stressing the health risks associated therewith. *Richter* then focussed on what could be done to combat overweight and obesity, mentioning Regulation (EU) No. 1169/2011 on the provision of food information to consumers in the form of nutrition declarations and food labelling. According to the speaker, overweight or obese individuals were often stigmatised as being lazy, undisciplined, incompetent or ugly and discriminated against because of these prejudices. But was such discrimination prohibited? There were hardly any prohibitions specifically targeting discrimination on grounds of overweight or obesity. One exception was the Elliot Larson Act of 1976 in the State of Michigan (USA). For

combatting these kinds of discrimination in Europe one either had to draw upon prohibitions targeting other types of discrimination or upon general equal protection clauses. *Richter* here referred to Art. 21 FRC and Art. 14 ECHR. It was questionable whether Art. 21 FRC could really be qualified as an open antidiscrimination clause whereas Art. 14 ECHR definitely could and continued to play a role in EU law due to Art. 6 (3) TEU. This led her to the question which specific grounds of discrimination covered overweight and obesity. One might initially think of 'disease', but overweight and obesity only increased the risk of secondary diseases. It was questionable whether obesity was itself a disease. Secondly, overweight and obesity could also be qualified as a disability. According to the CJEU's ruling in the *Kaltoft* case, the notion of disability had four elements. Only when all those elements were fulfilled, obesity could be qualified as a disability. In the more recent *Carlos Enrique Ruiz Conejero* case the Court recognised that the Directive 2000/78 precluded national legislation under which an employer was permitted to dismiss an obese worker who was frequently absent when his periods of absence were the consequence of a disease attributable to a disability. In her conclusion *Richter* clarified the differences between a purely domestic application of European antidiscrimination law (as in the case of *Kaltoft*) and cases with cross-border implications.

In her comment, *Tamara Hervey* (University of Sheffield, UK) spoke about "non-ideal weight discrimination in EU law". She stressed that "non-ideal weight" referred not only to overweight but also to underweight and that there was persistent discrimination against and stigmatisation of people of "non-ideal weight". However, European law did not include any specific prohibition of discrimination based on physical appearance, whereas some Member States, for example France, recognized it as a prohibited ground of distinction. At the European level, one might use the prohibition of discrimination based on disability to provide protection. According to *Hervey,* this would require a social model of disability discrimination according to which disability was the result of social ascription. The UN Convention on the Rights of Persons with Disabilities had indeed used that model. According to *Hervey,* the CJEU's case law since 2010 could be understood as using the "social model" as an approach to interpreting EU equality legislation, although this was disputed in the literature. If the CJEU did recognise the "social model", this could also include attitudinal barriers producing discriminatory decisions against people with non-ideal weight. In this case, these people would be better protected against discrimination.

The subsequent presentation "**The Impact of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law**" was given by *Theresia Degener* (Evangelical University Rhineland-Westphalia-Lippe, Bochum Germany). She underlined that the CRPD was the first binding international human rights treaty in this area and a treaty of paradigm change, replacing the medical by the social model of disability. Provisions concern-

ing non-discrimination could be found in Art. 3 and 4 CRPD obliging States to modify or abolish existing law. However, according to *Degener,* the most important clause was Art. 5 CRPD naming specific measures which should be taken by the States in order ensure equality. In General Comment No. 6 of 2018 on Art. 5 CRPD, those obligations had been elaborated further by using the inclusive equality model with its four dimensions. *Degener* then addressed herself to the relationship between non-discrimination and accessibility, in conjunction with States Parties' obligation to ensure reasonable accommodation. Accessibility was group-oriented and a proactive systemic duty whereas the principle of non-discrimination was individual-oriented and a reactive individualised duty. When depositing its instrument of formal confirmation of the CRPD, the EU had also deposited a declaration concerning the competence of the (then) European Community with regard to matters governed by the Convention. The EC/EU and Member States also agreed upon a code of conduct on the details of the representation of the EC's/EU's position in the bodies created by the CRPD. Within the EU legal order, the CRPD (like other international agreements) ranked below primary law, but above secondary law. According to *Degener,* the EU's report of 2015 contained some interesting promises, including the adoption of a horizontal Directive on equal treatment (which would cover disability) and a European Accessibility Act (EEA) in the form of a Directive. There had indeed been improvements since then, including the Disability Strategy 2010-2020, the 2013 General Regulations on the European Structural and Investments Funds and the adoption of the EAA by the European Parliament, although it had not yet entered into force. However, there still was no horizontal Directive on equal treatment even though the Commission proposal had been submitted already in 2008.

In her comment, *Andrea Broderick* (Maastricht University, The Netherlands) underlined the importance of the social-contextual model of disability that underlies the CRPD, emphasising the interaction between people with impairments and barriers in society. *Broderick* referred to the social-contextual model in order to define the concept of disability. The right to reasonable accommodation constituted an integral component of inclusive equality. *Broderick* mentioned that it was disputed in literature whether the CJEU follows exactly the CRPD's definition of disability. The Court had added to that definition the idea of limitations resulting from impairments which, in interaction with other barriers, hindered participation in professional life. Thus, the CJEU seemed to have moved away from the human rights model. Finally, *Broderick* discussed intersectionality which certainly was part of the CRPD as there was an explicit provision on women with disabilities (Art. 6). However, in her opinion, current EU law does not deal expressly with intersectional or multiple discrimination, and it appears, on the basis of recent case law, that this category of discrimination cannot be read into EU secondary legislation.

Gözde Kaya's (Dokuz Eyül University, İzmir, Turkey) intervention concerned "**Age Discrimination as a Bone of Contention in the EU**". She reminded us that age discrimination might be experienced by anyone. Age discrimination was the subject matter of various primary law provisions, including Art. 10 and Art. 19 TFEU, Art. 21, Art. 25 and Art. 34 FRC. Additionally, she referred to Directive 2000/78 which combatted discrimination in employment and occupation. Art. 6 of this Framework Directive focussed particularly on age discrimination by permitting specific justifications. *Kaya* also stressed current problems within the EU, namely the ageing population and the extension of life expectancy. She then focussed on compulsory retirement ages which was linked to stereotypes with regard to lower productivity and reduced mental and physical capabilities of older employees. The respective rules on compulsory retirement ages might contravene "the right to engage in work" guaranteed by Art. 15 FRC. The CJEU's scrutiny with regard to compulsory retirement consisted of a four steps. After determining whether the case was within the scope of Directive 2000/78, the Court inquired if there was differential treatment because of age, if that was "reasonably and objectively justified" and ultimately applied the proportionality test.

Ulrike Fasbender's (Oxford Brookes University, UK) comment came from the angle of a psychologist. The first question she raised was whether age discrimination only happened to old people or to what extent young people were also concerned. She then focussed on the stereotypical reasons why older workers might be discriminated. Referring to the intergroup bias in organisations and the interdependence of thoughts, feelings and behaviour within one company, she concluded that those stereotypes had been proven wrong. *Fasbender* mentioned research showing that older workers were perceived as warm, but not competent. However, one had to keep in mind that older workers were not all alike. She also emphasized the importance and meaning of work for the individual apart from the financial aspect, namely the willingness to participate in and contribute to society.

In the discussion round including all the aforementioned speakers, the question was raised why the CJEU seemed to be reluctant and cautious in this area. This could perhaps be explained by the Court's fear of being criticised for being too creative. The Court also generally stuck to secondary law wherever it was exhaustive and avoided applying primary law. Another reason might be implicit in the Charter which in certain areas laid down only principles instead of detailed rules. The discussion then moved to the prevention of obesity. In this context, it was stressed that one should not confuse prevention and protection, as prevention conveyed a message of stigmatisation. Prevention should thus not be at the centre of the non-discrimination discussion. The question also was whether the inclusive approach for defining disability also included health status, such as obesity. With regard to age discrimination, the cases against Poland pending before the CJEU that concerned the reduction of the mandatory retirement age of judges was discussed. It was also pointed out that there were

differences regarding age discrimination in Europe and the Western world in general and Asia. Since discrimination nowadays was rather indirect than direct, it was not always easy to detect and prove that you had been discriminated. With regard to intersectionality, it was more difficult to justify discrimination that was based on several grounds.

The **fourth part of the conference** was devoted to **"The EU as Promoter of Equality – Inside and Outside Perspectives**. *Anne Thies* (University of Reading, UK) started out with a presentation on "**The EU's External Action to Promote Equality in the Wider World**" and put special emphasis on gender equality. After providing a short definition of the internal and external nexus, she analysed how equality considerations could affect the EU's external action. In this context she argued that equality considerations shaped the legal and policy framework on the basis of both EU Law and public international law. She then focussed on equality provisions in EU primary law, namely Art. 8, 10 TFEU and Art. 2, 4 and 21 TEU, offering a detailed analysis of the latter provision. Looking at the international dimension, *Thies* highlighted important instruments in international law such as CEDAW, the UN Resolution on Women, Peace and Security or the 2030 Agenda for sustainable development. At the EU level, she put special emphasis on the EU policy framework which included a strong commitment to the promotion of gender equality in the world as demonstrated *e.g.* by the renewed Gender Action Plan of 2015 for the period of 2016-2020. According to *Thies*, Art. 21 TEU prescribed explicit objectives for EU external action and the EU was obliged to follow up on these commitments and agenda. Challenges remained, however, as it still was unclear *e.g.* to what extent the EU had competence to engage in international cooperation in order to promote equality.

In her presentation, *Rosaan Krüger* (Rhodes University, Makhanda, South Africa) reflected the "**African Perspective**" with special focus on South Africa. After a short overview of the antidiscrimination provisions in Art. 2 and Art. 3 of the African Charter of Human and Peoples' Rights, she concentrated on the South African constitutional provisions relating to equality, the constitution having been made in direct response to the country's history of inequality and racial discrimination. Equality thus was the constitution's focus and organising principle. *Krüger* then compared the approaches of European and African courts in their case law on the balancing of non-discrimination and freedom of religion. *Krüger* referred to UK and German court decisions in light of the recent CJEU judgments in *Egenberger* and *IR* which showed a clear shift toward non-discrimination. Particularly in *Egenberger,* the Court set out principles and *dicta* that it also applied in the *IR* case. These decisions were compared to relevant African case law from courts in Uganda, Zimbabwe and Kenya which indicated a diverging approach. Finally she analysed the development of the South African case law in light of the aforementioned decisions. All that African and European case law demonstrated that the courts were engaged in a balancing of rights. Migration and globalisation might pro-

duce new norms and challenges to equality and non-discrimination which could in turn lead to reconsideration of the necessity of striking a balance. Therefore *Krüger* suggested starting negotiations to create a framework to determine fairness. There should also be consultations with directly affected persons, because the moment matters were brought before courts, decisions had to be taken on who was right or wrong.

Mathias Möschel (Central European University, Budapest, Hungary) presented the "**American Perspective**". He could not discern any major differences between the EU and the US concerning illicit grounds of discrimination, legal guarantees, institutions and concepts, both in court practice and in academic debate. For American lawyers, there were nevertheless a number of irritating aspects: One was the multi-level framework, which differed from the pyramidal organisation of the US federal system. The European antidiscrimination framework consisted of national case law, the EU as an actor, the ECHR, the European Committee on Social Rights and on top of that a whole set of UN bodies such as CEDAW, CERD or the Human Rights Committee. *Möschel* then highlighted positive developments in Europe compared to the US and welcomed *e.g.* the broader scope of the prohibition of indirect discrimination in Europe compared to the narrowed down approach by the US Supreme Court. On the other hand, *Möschel* deplored the clear reluctance in Europe to deal with issues of race, whereas in the US there was a much broader social understanding about what antidiscrimination law entailed and what it required in this regard. Another major difference *Möschel* stressed concerned the amount of damages awarded which resulted from the structure of American law and the important role of punitive damages.

The final presentation by *Holning S. Lau* (University of North Carolina, Chapel Hill, NC, USA) and *Kelley Loper* (University of Hong Kong, PRC) on "**Asian Perspectives**" focussed on the EU's soft power, that is to say its influence on legal developments in Asia through non-coercive means in the form of persuasion. Thus, Indian courts regularly cited comparative law, including CJEU decisions in equality cases, often also engaging with the CJEU's reasoning. *Lau* stressed that the EU's influence in India had wider repercussion due to India's considerable influence on other South and Southeast Asian legal systems. In order to increase the persuasive influence of EU law on Asian courts, it was suggested that the CJEU should engage in a two-way dialogue by taking Asian case law into account. Gender identity discrimination was identified as one of the most promising areas of such a dialogue. Moreover, the shift towards dialogue would help the EU to protect itself from reproaches of neo-colonialism. *Loper* distinguished active and passive soft power mechanisms: Active influence was exerted where the EU directly engaged States or regional organisations through technical assistance or regular human rights dialogues; passive influence was exerted where the EU "led by example", *e.g.* through legislation or judicial opinions. *Loper* then identified strengths and weaknesses of soft power mechanisms and recommended that the EU's soft

power strategy should focus on empowering local government and civil society actors. She gave examples of Hong Kong courts which used international human rights instruments as well as CJEU decisions in discrimination cases. *Loper* concluded that EU strategies should be recalibrated in order to have a greater chance of empowering local advocates and suggested that non-discrimination might be particularly well-suited for soft power influence in Asia.

The **concluding panel** searched for an answer to the question whether the EU really was a protagonist of equality. In her opening statement, *Ivana Jelić* (Judge, European Court of Human Rights, Strasbourg, France) first mentioned the current political obstacles to finding a European consensus, as the ongoing debate on migration demonstrated. In her view, one could not speak only about the EU as a protagonist of equality because the Council of Europe played an equally important role in this area. The European Convention on Human Rights and the European Court of Human Rights with its case-law were significant parts of the European *acquis,* especially as potential candidate countries for EU membership were supposed to respect the ECtHR case law. *Jelić* stressed that the principle of non-discrimination was a fundamental principle not only of EU law but also within the Council of Europe framework. However, as the problems with EU accession to the European Convention on Human Rights demonstrated, there also were differences in approach between the CJEU and the ECtHR. Thus, the dialogue between the two courts was an important factor for developing cooperation. In the second part of her statement, *Jelić* referred to some discrimination cases of the ECtHR. The first one concerned discrimination against members of ethnic or religious minorities in the constitutional system of Bosnia and Herzegovina where political representation was strictly based on membership in one of the three constituent peoples, excluding all persons with other affiliations. The judgment of 2009 finding a violation of the ECHR had still not been executed for political reasons. This demonstrated the political influence on human rights protection. Another relevant issue was the protection of religious minorities. She referred to a 2018 judgment against Greece where the ECtHR had for the first time applied Art. 14 ECHR in conjunction with Art. 1 of the Additional Protocol. Lastly, *Jelić* emphasised that the Strasbourg Court and national courts could learn from each other, making consistent dialogue between them an important means to enhance human rights protection.

From an academic perspective, *Dagmar Schiek* (Queen's University, Belfast, UK) distinguished three dimensions of equality: equality regarding persons (*e.g.* producers versus consumers), equality regarding groups (*e.g.* minorities versus communities) and equality regarding institutions (*e.g.* parliament versus government). From the constitutional perspective, one should remember the personal focus of EU constitutional law, which was reflected in the reference to the principle of human dignity. From that principle, *Schiek* derived the pre-

eminence of the equality of persons, while the equality of groups and institutions should serve the equality of persons. She subsequently turned to the initial question whether the EU could be regarded as a protagonist of equality. From a constitutional perspective, it was all about the protection of rights within the EU. She emphasized that a multidisciplinary approach was required when discussing the protagonist role of the EU in the field of equality. *Schiek's* approach was a legal one meaning that she concentrated on how the EU promoted equality through *rights* and therefore focussed on constitutional equality clauses. Constitutional equality clauses in the EU tradition concerned the equality before the law and equality under the law. These clauses bound the Member States, but the question was whether they actually had an impact on the socio-economic reality. The answer depended on whether the constitutional equality clauses had horizontal effects, which still was a matter of dispute.

Schiek explained that the EU as a community based on law that primarily aimed at creating an internal market had somehow turned around the order of things: From the continental European perspective it was the constitution that came first and antidiscrimination law and policy only second – but in the EU, it was the other way around. While EU antidiscrimination law and policy was strong, its bite was ironically reduced by the rise of EU constitutional equality clauses, which was a dilemma. From a legal perspective the effectiveness of the EU's protagonist role with regard to equality depended on the effectiveness of the national systems – therefore the EU had great potential of becoming a protagonist of equality, but presently that conclusion was not yet warranted.

Andreas Ziegler referred to the EU's external action for promoting equality, especially the issue of compelling third countries to introduce European values in their national systems through the means of trade law. He also highlighted the role of new technologies, including the internet, algorithms and artificial intelligence which had to be included in the non-discrimination discourse. Finally, *Ziegler* commented on the current political and societal backlash regarding extensive non-discrimination policies and law. There was a new phenomenon that people who did not belong to the vulnerable groups protected by non-discrimination law felt themselves discriminated if antidiscrimination measures were taken. Their position could be rooted in traditional conceptions or religious beliefs. Thus, we should not take the current progressive system for granted, but would continuously have to defend the values of equality and non-discrimination.

The **concluding discussion** started with a remark by *Ivana Jelić* about the importance of a substantive notion of the rule of law, which was affirmed by *Dagmar Schiek*. She also pointed to the danger arising from minority protection as soon as this endeavour conflicted with the prohibition of discrimination on other grounds. In her view, minority protection inherently protected the cohesiveness of a certain group, which could lead to discrimination of smaller

groups within the protected minority. *Andreas Ziegler* stressed the importance of raising awareness regarding equality and non-discrimination not just in the field of academic research but also in the practice of teaching. Especially in legal education, teachers and textbooks too often made use of stereotypical examples which contributed to the maintenance of existing inequalities. *Dagmar Richter* pointed to the great divergence between formal rules and actual practice in the field of non-discrimination. *Dagmar Schiek* suggested that this gap could only be bridged by a more result-oriented approach in contrast to the current focus on procedural rules.